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NABWETEME HADIJA

v.

PP

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HIGH COURT MALAYA, PENANG
MOHD AMIN FIRDAUS JC
[CRIMINAL TRIAL NO: 45-11-2011]
14 MARCH 2012

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Trafficking - Ingredients of offence - Whether established - Whether accused had custody, control and knowledge of drugs in bag - Whether prosecution proved case beyond reasonable doubt*

D The accused, a national of Uganda, was arrested after she was found with 2329 grams of methamphetamine which were recovered from the trolley bag ('P9C') that she had taken with her upon her arrival at the Penang Bayan Lepas International Airport from the Contonou Airport in Benin. The drugs were recovered from a hard layer at the bottom of the bag by the investigation officer PW11.

E The accused was subsequently charged with the offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The accused submitted, *inter alia*, that: (i) the prosecution had failed to prove a *prima facie* case against her; (ii) the prosecution had not proved custody and control over P9C and P14B

F containing the drug by her; (iii) P9C had been in Thai police's detention for 'unknown reason' for two days and the police had failed to call the Thai police to explain why the bag was with them; and (iv) the investigation was incomplete. The prosecution on the other hand submitted that they had established a *prima*

G *facie* case against the accused.

At the end of the prosecution case, based on the principles in the case of *Looi Kow Chai & Anor v. PP*, the court found that the prosecution had proved a *prima facie* case against the accused.

H The accused was therefore called to enter her defence. In her defence the accused contended that she had previously come to Malaysia before to buy artificial pieces of jewellery for the women folks to be sold in her home country. She further stated that she had to borrow the trolley bag from her friend by the name of

I Vicky because her bag was still wet after bringing it back from the dry cleaner. The accused said that she did not know about the presence of the drugs inside the bag. The accused further stated that when PW11 stopped her, she became nervous as at that

time, she was trying to find her way out and where to check out since it was her first time in Penang. The issues for the court's determination were: (i) whether Vicky was a real person or a fictitious character; (ii) whether the trip of the accused to Penang was actually to buy artificial jewellery to trade them back home in Uganda; and (iii) whether the accused succeeded in raising a reasonable doubt to the prosecution's case.

Held (finding the accused guilty; convicting and sentencing accused to death):

(1) Based on the evidence, Vicky, as claimed by the accused to have lent her the bag (P9C) containing the drugs, did not exist. It is settled law that generally if the accused passed up the opportunity to lay the foundation of his core defence during the cross-examination of the prosecution witnesses he will bear the risk of the trial court later making an inference that the thrust of his defence is a concoction. It was aimed to avoid surprise at the trial and to prevent a miscarriage of justice. This was a crafted defence to throw the blame onto the fictitious character Vicky because the accused was caught red-handed with the drug. (paras 134, 135 & 139)

(2) The accused had custody and control of the bag and had knowledge of the nature of the hidden content inside the bag. Her conduct at the airport gave away the true purpose of her trip to Penang. PW11 in his testimony said that he found a "hard layer at the bottom of the bag". Thus in all probability when the accused was packing her clothes, she ought to have felt the hard layer at the bottom of the bag. (paras 140-142)

(3) Section 8(2) of the Evidence Act 1950 was applicable as the accused was seen by PW11 to have acted furtively and keeping a look-out as she was pulling the trolley bag which held the drug. Although PW11 had already identified himself as a police officer to her, nevertheless the accused still remained confrontational. As pointed out by the prosecution, this was not the first trip to Malaysia by the accused, and the accused should be familiar with the airport building. (para 143)

(4) When she was caught, not much money was found on her. Therefore, her evidence that the purpose of her coming over to Penang was to buy artificial jewellery to trade them in Uganda was not true. If it was true, she would have brought along at least a reasonable amount of capital to buy the items. (para 145)

(5) The accused failed to raise a reasonable doubt on the prosecution's case and the prosecution had proved its case against the accused beyond reasonable doubt. *(Mohd Radhi Yaakob v. PP* refd). (para 146)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ong Ah Chuan v. PP And Another Appeal [1980] 1 LNS 181 PC ***(refd)***
PP v. Abdul Rahim Kalandari Mustan [2008] 5 CLJ 108 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Salleh Zakaria & Anor [2010] 4 CLJ 671 CA ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 256 FC ***(refd)***
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Tong Peng Hong v. PP [1955] 1 LNS 165 HC ***(refd)***
Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1), (2), (3), (4)
Dangerous Drug Act 1952, ss. 2, 37(d), (da)
Evidence Act 1950, s. 8(2)
Firearms and Ammunition (Unlawful Possession) Ordinance 1946, s. 3

Other source(s) referred to:
Stephen's Digest, 9th edn, p 304

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For the prosecution - Mohd Amril Johari; State Legal Advisor

Reported by Emm Zehra

JUDGMENT

Mohd Amin Firdaus JC:

[1] The accused person named Nabweteme Hadija, a national of Uganda was charged with the following charge:

> Bahawa kamu pada 9hb September 2010, jam lebih kurang 11.30 malam di Bahagian Ketibaan Lapangan Terbang Antarabangsa Bayan Lepas, di dalam Daerah Barat Daya, di Dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu sejumlah berat 2329.0 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B (1) (a) Akta Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama.

Prosecution Case

[2] Roslan bin Abd Hamid ("PW5") a Customer Service Agent who works for the Malaysian Airlines at the Penang Bayan Lepas International Airport and was also the handling agent for Thai Airways gave evidence that on 7 September 2010 he was working at the Baggage Section in the Arrival Hall at the airport. PW5 was on duty there to make sure that passengers did not lose their baggage or made complaint about their damage.

[3] PW5 narrated that on that day an African woman passenger named Nabweteme Hadija later identified as the accused during the trial, complained to him that her piece of baggage was missing. She had disembarked from flight No. TG 425 from Bangkok to Penang. The accused began her flight from Contonou Airport in Benin and flew in transit through Lome Airport in Togo, Bole Airport in Addis Ababa, (all airports from the continent of Africa) Suvarnabhumi International Airport in Bangkok before finally arriving at Penang Bayan Lepas International Airport. She told PW5 that she had checked in with one piece of baggage but it did not arrive. He took down her telephone number 017-4421624 in order to contact her. PW5 communicated with the accused in the English language and was certain that she understood what he was saying.

[4] The accused referred to PW5 a baggage claim tag and after receiving the complaint, he issued her a report (exh. P10) made at 10.39pm. Based on her complaint, PW5 sent telefax

(telefacsimile) regarding her complaint to every transit station along the flight route that she had passed through but did not receive reply from any of them. They were sent the same evening on 7 September 2010. He did not know whether there was any response from Thai Airways. From the tag he said that it stated one black trolley bag. Based on the baggage claim tag which originated from Cotonou Airport in Benin, the bag weighed 31 kilograms.

[5] The prosecution next witness named Ooi Hai Soo ("PW4") the Airport Service Manager of the Thai Airways testified that he had worked for the Thai Airways for 39 years. Out of the 39 years, he put in 29 years of service as Airport Service Manager and the airport Thai Airways staff workers are under his supervision. PW4 said that on 7 September 2009 he was not working and thus he did not know about any case concerning a lost luggage.

[6] However in the morning on 8 September 2010 a staff worker informed him about a case of missing luggage. PW4 was told that a woman passenger named Nabweteme Hadija later identified as the accused in the case, had reported that her bag was lost on 7 September 2010 during the evening when she arrived from Bangkok by Thai Airways Flight No. TG 425 by producing the baggage claim tag. She had come to the Thai Airways at the airport to inquire about her bag and that was the first time PW4 met the accused as she came to his office.

[7] PW4 testified that he took pity on the accused because she came all the way so far and her bag went missing and besides, she claimed that she had no money. PW4 said that in a situation where the passenger's bag is missing, the standard procedure of Thai Airways is to make an interim payment to help the passenger to buy undergarment, toothbrush, toothpaste, shaver and the like.

[8] The accused reported to the Thai Airways about her missing luggage, one bag as seen in the property irregularity report ("P10") issued to her upon receiving her Claim Tag. He said that P10 shows the tag number is XH 129744/, the itinerary of the passenger, the colour and type of the bag. Type 22 as classified in P10 refers to a trolley type of bag with wheels and handle. The colour of the bag is black based on P10. PW4 further said

that normally a copy of such report would be given to the passenger who made about the missing luggage and the accused's report was received by their Ground Handling Agent from Malaysian Airlines (MAS) Roslan bin Abd Hamid ("PW5").

[9] In tracing the missing bag of the accused, PW4 narrated that their ground handling agent from MAS then logged onto the 'World Tracer' which is a computer tracer system used by most major airlines in the world to trace missing luggage (exh. P11). Their agent also sent out telefax messages to the respective airlines and transits station involved to find the bag of the accused.

[10] In his narration, PW4 gave evidence that after having taken all the necessary steps to trace the missing bag, he knew that initially there was no reply from Bangkok because he was monitoring the situation. However at 6.15pm on 9 September 2010, Bangkok Thai Airways responded by telefax informing their counterpart at the Penang Bayan Lepas International Airport that they had found the bag and would be sending it *via* their Thai Airways flight that same evening.

[11] The telefax stated that the particular bag had been located in Bangkok and Bangkok Thai Airways had received it from the Thai police with the remark "unknown reason." It also noted that the accused had checked in with only one piece of luggage weighing 31 kilogram based on the claim tag.

[12] On the same day that is 9 September 2010 over 10.00pm in the evening, the missing bag arrived *via* a Thai Airways flight and the accused was informed by one of the MAS staff that her bag had been found and asked her to come to the airport to claim it.

[13] PW4 in his further evidence said that the accused signed for clearance of the bag on 9 September 2010. The bag was reweighed by their ground handling agent as a standard procedure before releasing it and found to weigh 31.5 kilograms, a difference of 5 kilograms compared with the weight stated as 31 kilograms on the claim tag issued from Contonou Airport. He added that every three to six months the airport weighing scale was calibrated because after a few months, the scale would not be accurate and according to PW4, the deviation from accuracy is very common. The Malaysian Airlines (MAS) then issued a release form as a standard procedure and there was no remark about damage to the bag in it.

[14] PW4 explained that baggage in transit are normally on the 'air side' and inside the air side is called security area because usually no passengers or outsiders can gain access to this area except the baggage handlers and the authorities concerned.

[15] PW4 gave further evidence to explain that normally their ground handling agent before releasing the baggage would ask the passenger claiming it to check for any damage to the baggage like missing wheel, cut or whatever damage. If so, it is noted on the release form but according PW4 in the release form of the accused there was no such remark.

[16] PW4 spoke basically in the English language to communicate with the accused and he believed that she understood that her bag was still missing at that point in time when she met him.

[17] Mohd Irfan bin Mohd Ghozir ("PW6") who works as an Airport Operation Assistant in the Baggage Service Section at the Penang Bayan Lepas International Airport testified that on 9 September 2010 he received a telefax from Bangkok, Thailand, regarding one piece of baggage that would be arriving on Thai Airways International Flight aircraft TG 425 from Bangkok at night that same day. PW6 said that the baggage was detained by the Bangkok police with unknown reason.

[18] Eventually when the missing bag arrived in the airport as stated in the telefax, PW6 retrieved the bag to make a report. He also compared the bag received to the details given in the telefax and found that it was the correct bag. The black bag, a trolley one with wheels was then in good condition as stated in P11 and it did not specify any damage and it had three baggage tags and locked with two padlocks.

[19] Another prosecution witness Devaraj a/l Arupudaraja ("PW7") who works as an airport operation agent for the Malaysian Airlines at the same airport testified that on 9 September 2010 he was on duty from 5pm until 1am in the baggage service station. PW7 was then working together with his colleague PW6 on late shift duty with the latter working until 11pm. After finishing his duty and before going home PW6 gave him a particular report number telling him that a passenger would be coming to collect her luggage. PW6 told him that this case was

reported two days ago and he had already called the passenger the owner of the bag who replied that she would be coming that same day (9 September 2010) to claim it. He asked PW7 to see to the matter.

[20] PW7 said that the information contained in the report (P10) stated the passenger's name is Nabweteme Hadija, the flight details, and that the bag is black in colour with handle and wheels including the important piece of information which is the tag number.

[21] PW7 checked the bag for any damage and saw it in good condition and the tag number was the same. PW7 further gave evidence that later in the evening on the same day from 11pm to 11.30pm the accused came to collect her bag. PW7 conversed with the accused in the English language and found that she could understand him.

[22] Before PW7 handed over the bag locked with two padlocks to the accused, he asked her to look at her bag for any damage. The accused did check her bag and PW7 said that there was no complaint from the claimant meaning the accused. The accused next signed a standard release form. After that, she was told to get customs clearance as she had been an international passenger. PW7 was not sure whether the accused did later go to the customs department after she had walked away with her bag.

[23] The prosecution star witness Chief Inspector Balber Singh a/l Hadep Singh the complainant of the case who was attached to the Penang Bayan Lepas International Airport Narcotics Office ("PW11") as an investigating officer, gave evidence that on 9 September 2010 he was working from 8pm until early hours the following day. At about 11.30pm he was with two of his subordinate officers namely D/Cpl (Detective Corporal) (R/F 69243) Abdul Wahab and D/Cpl (R/F 136868) Cathrene a/k Idem were carrying out surveillance on passengers in the domestic arrival section of the airport, when they saw a female foreigner later identified as the accused at the trial, behaving suspiciously while walking out from the arrival section pulling a black trolley bag and carrying her hand bag with her left hand.

[24] PW11 saw the manner the accused was walking in the domestic arrival section in looking left and right, stopped; then started to walk and looked left and right again. PW11 and his two officers then approached the accused and PW11 identified himself as a police officer from the Narcotics Division to her in the English language. He asked the accused in a 'simple way' where she was from and where she was going. The accused reacted nervously and asked "Why you checked me?" PW11 answered "I am doing my routine job and this is at random." The accused then started to mumble "Oh no, this is not."

[25] PW11 added that from the reaction of the accused and being a narcotics officer "I felt like something I need to go further check on this passenger." PW11 followed up by pulling the bag of the accused and followed by her to the customs scanner. His two subordinate officers followed along. When he reached the scanner, he lifted the bag and put it on the scanner and asked Saidatul Hanim binti Sabuti ("PW8") a woman staff from the customs department to scan the bag. The accused looked at her bag which was being scanned and PW11 told her that it was a procedure to be undertaken. After scanning the bag, PW8 told PW11 that she detected some greenish colour, some suspicious like things hidden inside the bag.

[26] After the scanning was done, PW11 carried the bag followed by the two detective corporals who escorted the accused to his office for further checking. In the office in front of the accused PW 11 told the accused that he wanted to check the bag ("exh. P9C") which was locked with two padlocks. PW11 asked the accused "Where are the keys?" and she opened her hand bag and took out the keys and opened the padlocks. PW11 opened the bag which was zipped and saw clothes inside and took out all the clothes one by one but found nothing incriminating among them.

[27] However, PW11 found a hard layer at the bottom of the bag and cut the lining covering it and tore it open. He found the screwed trolley handle blocking the material covering the bottom of the bag and took out the screws and removed the handle. PW11 pulled out 1 packet wrapped with cellotape. PW11 said that at that moment the accused standing beside him started crying and remarked "Oh, what is this? I don't know" and she started sweating. PW11 told her to relax, be calm and sit down.

[28] The accused saw the gap at the bottom of the bag when PW 11 showed it to her. PW11 cut open a little bit of the packet to see what was inside and found crystalline substance suspected to be the drug metamphethamine. PW11 weighed the packet ("exh. P14B") containing the drug and found the gross weight was 3 kilograms and then directed the woman corporal to take the accused to a room for body search and was later informed by the corporal that nothing illegal was found on her person. PW11 had also inspected the hand bag of the accused and found some documents and her passport inside it. PW11 later put back the substance into the bag and took care of the bag.

[29] On 10 September 2010 around 1.30am. PW11 lodged a police report in conjunction with the arrest of the accused and at 3.45am he handed over the accused together with the exhibits and her personal belongings to the investigating officer of the case Inspector Prem a/l Sepermaniam ("PW12"). PW12 prepared a Form ("P20") listing down the exhibits and the personal items handed over to him by PW11.

[30] PW12 gave evidence that on 10 September 2010 at about 1am he received a telephone call from PW11 informing him about the arrest of a foreigner later identified as the accused with drugs at the Penang Bayan Lepas International Airport. After receiving the telephone call, PW12 and a police photographer Cpl Rohizan bin Salim (PW1) went to the airport and met PW11 at the Narcotics Department of the airport. At the airport, PW1 took photographs at the scene of the crime at 1.30am and at 2.30am he was asked by PW12 to take photographs of the bag (P9C) and the packet (P14B) containing the drug at the Balik Pulau District Police Station witnessed by PW11, D/Cpl Abdul Wahab and D/Cpl Cathrene a/k Idem from the airport Narcotics Branch together with the accused. PW1 was also directed by PW12 to do finger dusting on P9 and P9C but the result was negative.

[31] PW12 testified that he received the accused together with the packet which was in good condition and inside the packet is a layer of plastic material (air bubble film) containing the drug. PW12 also checked the form which listed all the exhibits including the personal belongings of the accused. Later PW12 left the airport with the accused and the exhibits (P9C and P14B with the drug) back to the district police station in Balik Pulau and throughout the journey, the bag and packet of drug were under his custody.

[32] On arrival at the police station, PW12 put the accused in the lock-up and then he weighed the packet of drug and marked all the exhibits and put his signature and the relevant date on each exhibit. He also informed his superior officer about the case. After doing all this he kept the packet of drug in his own locker which he alone holds the key and no one has access to it.

[33] PW12 followed up basically with the formal part of investigation like getting hold of the CCTV (closed circuit television) footage from the airport; directing another police photographer Cpl Badrul Hisham bin Ahmad (PW2) to take photographs of P9 at PW12's office on 13 September 2010 around 2pm and the following day at about 10am taking photographs of clothes which fitted the accused; recording the statement of the accused; packing and sealing the P9 to send to the chemistry department; and after analysis taking the exhibit back from the chemist Teoh Choon Ping (PW10) on 23 February 2011 thereafter sending it to be kept at the police exhibit store.

[34] PW10 the chemist gave evidence that after analysing the crystalline substance found inside one 'polyfoam' packet, he found the substance to contain 2329.0 gram of methamphetamine.

[35] After PW12 had finished testifying, the prosecution closed its case and offered D/Cpl Abdul Wahab bin Abd Kadir, D/Cpl Catherine, ASP Muniandy, Cpl Abd Rahim bin Ismail, Lans/ Cpl Raju, Cpl Rosmadana bt. Mat Desa, L/Cpl Mohd Sofian, and Noorliza bt Mohd Noor.

[36] The defence did not need any of the witnesses.

At the Close of the Prosecution Case

Submission by the Defence

[37] The learned defence counsel argued that the prosecution had failed to prove a *prima facie* case against the accused. He pointed out that the court must make a maximum evaluation of the prosecution evidence and if there were any inference favourable to the accused, the court must draw such inference for the benefit of the accused.

[38] He cited *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 (CA) and *Balachandran v. PP* [2005] 1 CLJ 85 (FC) to illustrate the principle argued.

Possession

[39] He contended that the prosecution had not proved possession that is custody and control over P9C and P14B containing the drug by the accused. The only piece of incriminating evidence is that the accused had possession of the two padlock keys which she handed them over to PW11 contrary to the evidence adduced by the prosecution that the accused took out the keys from her handbag and opened the two padlocks locking black trolley bag herself.

[40] The drug was concealed inside the bag and could not be seen with the naked eye, implying that she had no knowledge of the existence of the drug.

Trolley Bag (P9C) in Bangkok

[41] The prosecution evidence is that the black trolley bag (P9C) was in Bangkok, Thailand for two days. It was detained by the Thai police for 'unknown reason.' It was with the Thai police for two days and the prosecution did not call the Thai police to explain why the bag was with them. Who sent the bag to the Thai police in Bangkok whereas the bag originated from Contonou Airport. The bag contained drug with a street value of RM1.2 million. On arrival from Bangkok, the weight of the bag was different as the bag was originally weighed at 31 kilograms but now weighed 31.5 kilograms. The accused was only carrying one hand bag.

[42] The possibility of tampering with the bag at the airport in Bangkok cannot be ruled out.

Padlock Keys

[43] Even though the accused had possession of the padlock keys to the incriminating black trolley bag (P9C) it does not necessarily mean that the accused had knowledge of the presence of the drug inside the bag.

[44] Apart from this, the two padlock keys can easily be opened by a master key, meaning anyone could have easily opened the bag and concealed the drug inside it.

A **The Investigating Officer**

[45] The investigation by PW12 is not complete. The drug was found concealed at the bottom of the bag but PW12 did not go to the factory where it was made to see whether the bag is of
B standard design. An officer from the factory where the bag was manufactured must be called as a witness to give evidence on the standard design of the bag. There is no proof that the bag had been specially modified with the special compartment found to hide the packet of drug.

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[46] The bag was also not sent for fingerprint dusting to the chemist in order to connect the accused with the drug.

Maxis Bill

D **[47]** The handphone telephone number 017-4421624 belonging to the accused was first activated on 13 July 2010. The payment for the process was done by cheque. PW12 did not investigate who activated the number and the cheque was in whose name and who paid the bill. However the accused only arrived in
E Penang on 7 September 2010.

Jeans

[48] The pair of jeans from the bag did not fit the accused.

F **[49]** Hence, the prosecution did not prove a *prima facie* case against the accused and her defence should not be called. The accused ought to be acquitted and discharged.

Prosecution

G **[50]** The prosecution had proved a *prima facie* case against the accused.

Possession

H **[51]** When I/Balber Singh (PW11) first saw the accused she was carrying the black trolley bag (P9C) containing the drug at the airport. Thus she had custody and control of the drug in the bag which she possessed. Evidence of PW11 shows possession of the bag by the accused.

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[52] The defence argued that the drug was hidden and could not be seen by the accused. Invariably in all drug trafficking cases that came to light, the drugs were concealed. This involved the doctrine of wilful blindness.

Trafficking

[53] Section 37(da) of the Dangerous Drug Act 1952 (Act 234) applies as the amount of drug exceeded the statutory amount, thus there was trafficking. *Ong Ah Chuan v. PP And Another Appeal* [1980] 1 LNS 181 (PC)

Knowledge

[54] The fact that the drug was concealed in such a cunning manner only shows that the accused had knowledge of the drug. *Teh Hock Leong v. PP* [2008] 4 CLJ 764 (FC) was cited to support the learned deputy public prosecutor's contention.

[55] The conduct of the accused in crying, sweating at the airport upon discovery of the drug also reflected knowledge on her part regarding the drug. Section 8 of the Evidence Act 1950 applies.

Bag in Thailand

[56] The defence had argued that the bag was in Bangkok, Thailand, for two days meant that there could be tampering with it. If it had been tampered with, then there must be sign of tampering but PW4 had testified that the telefax (11) received from Bangkok did not specify any damage to the bag.

[57] If the Thai police wanted to nab the trafficker involved, it would be premature to open the bag first to get to the drug hidden inside.

[58] Moreover when the accused took back the bag from the airport she had been asked to check her bag for any damage but was found none and she signed the release form. PW7 also confirmed that the bag was not damaged on receiving it from Bangkok.

[59] Who would want to simply hand over a bag containing drug with a street value of RM1.2 million, the sum as stated by the defence, to the accused without anything more.

A **Packet**

[60] The packet containing the drug had been identified by PW 11 and his signature was on it together with the date '9 September 2010.'

B **[61]** In summing up, the learned deputy public prosecutor submitted that the prosecution had proved a *prima facie* case against the accused.

Court Findings

C *End Of Prosecution Case*

[62] At the close of the prosecution case the court followed the procedure as laid down under s. 180(1), (2), (3), and (4) of the Criminal Procedure Code.

D **[63]** In essence this provision emphasises on the ingredients of the offence to be proven by the prosecution and the evidence must be credible.

E **Case Law Authorities**

[64] In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 the Court of Appeal held that the trial court must make a maximum evaluation of the prosecution evidence and the trial judge must pose this question to himself:

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> If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer was in the negative, then no *prima facie* case had been made out and the accused would be entitled to an acquittal.

G

[65] In *Balachandran v. PP* [2005] 1 CLJ 85, the Federal Court held that: "Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out." It further requires the court

H to see whether there is any reasonable doubt in the prosecution case and if such doubt exists, there can be no *prima facie* case.

[66] In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, the Federal Court held that the amended s. 180 of the Criminal

I Procedure Code imposes upon the court to carry out a maximum evaluation of the evidence for the prosecution in deciding whether

to call for the defence of the accused. In doing so, the process involves an assessment of the credibility of the prosecution witnesses and the drawing of inferences admitted by the prosecution evidence. If the evidence admits inference favourable to the accused, the duty of the court is to draw the inference favourable to the accused.

Burden Of Proof

[67] As laid down in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 where the Supreme Court held that "wherever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 examines whether even though the court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case." To earn an acquittal, the duty of the accused is merely to create a reasonable doubt on the prosecution case. To rebut a presumption is on a balance of probabilities.

Ingredients of the Offence

Custody Or Control-Possession

[68] In *Chan Pean Leon v. PP* [1956] 1 LNS 17, Thompson J explained the meaning of possession by referring to Stephen's Digest (9th edn, p. 304):

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[69] It further stated that before possession is established, it must be shown that the accused is placed in a physical situation so that he is able to deal with the thing as if it belonged to him and that he must also have knowledge of the nature of the thing. The intention to deal with the thing as if it belonged to him when the occasion arise, cannot be proved by direct evidence and can only be proved by inference from the surrounding circumstances.

[70] In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 Per Arifin Zakaria FCJ (as His Lordship then was) held:

> It is trite that what constitutes 'possession' under s. 37 of the Act is a question of law. It is however a question of fact whether in a given case a person can be said to be in possession of something.

[71] Putting aside the presumption under s. 37(d) of Act 234, there is direct evidence from the complainant of the case (PW11) to show that the accused was in physical possession of the black trolley bag (P9C) and the packet (P14B) containing the drug. She was also found to have in her hand bag the keys to the two padlocks locking P9C thus denoting custody or control of the bag containing the drug.

[72] The circumstantial evidence also points irresistibility to the knowledge of the accused on the presence of the drug inside the bag. The court is aware that the burden to be borne by the prosecution is a heavy one if its case rests especially solely on circumstantial evidence. After retrieving the bag from PW7, she was informed by PW7 that as she had been a passenger on an international flight, she must take her bag to the customs department for clearance.

[73] When confronted by PW11 who took her bag to be scanned by the customs, never at any material time did the accused tell PW11 and his two subordinate officers that she had already scanned her bag at the customs scanning machine. The accused did not heed the advice given by PW7 to take her bag for customs clearance as she had been a passenger from an international flight from Thailand. The only inference for the court to draw is that the accused was then fully aware of the presence of the nature of the drug hidden inside the specially modified compartment of the bag. To take her bag for customs clearance would inevitably expose the hidden drug.

[74] PW11 in his testimony also pointed out that he approached the accused because of the manner in which she was walking with the incriminating bag which aroused his suspicion. She was walking and looking left and right, paused and then resumed walking and stopped again.

[75] The defence tried to explain that the accused being a first time visitor to Penang was not familiar with the airport and was looking for her way out.

[76] As pointed out by the learned deputy prosecutor, prior to 9 September 2010, the accused had come to the airport twice. On 7 September 2010 the accused had disembarked from her flight from Bangkok in the evening and the next day on 8 September 2010 the accused went to the airport to enquire about her missing bag and finally on 9 September 2010 she went again to the airport to claim her bag. Therefore she ought to be familiar with the interior of the airport premises after all the Penang Bayan Lepas International Airport is not a very big airport where one can easily get lost.

[77] PW11 had given evidence that the accused had cast furtive glances left and right, paused, and then repeated the same over again. PW11 is an experienced officer and not a novice and his suspicion was later proved correct by the discovery of the hidden drug. There was no reason for the accused to behave in that manner as she was already in the arrival section of the airport and if what she claimed were true, she could have easily approached any airport staff to ask for the way out.

Section 37(d)

[78] Leaving the question of direct evidence, and reverting to the element of possession, the court finds that the evidence given by PW11 and witnessed by D/Cpl Abdul Wahab and D/Cpl Cathrene shows that the accused had presumed possession of the bag (P9C) and the packet (P14B) which contained the drug at the material time at the airport in the evening on 9 September 2010. As alluded to earlier the accused was found to have the two padlock keys which padlocked the bag which the court infers that she was having custody over the bag which concealed the drug. By pulling the trolley bag the accused was having control over it which contained the hidden drug. Thus she was having possession of the drug.

[79] Gordon Smith Ag. CJ in *Toh Ah Loh & Mak Thim v. R* [1949] MLJ 54, where the Firearms and Ammunition (Unlawful Possession) Ordinance 1946, s. 3 was involved:

> Possession to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing,

A and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

Cases

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Knowledge

[80] To avoid needless repetition, the subject matter has already been delved into earlier. In *Tong Peng Hong v. PP* [1955] 1 LNS C 165 (HC) the High Court observed:

> If something is found for example in a bag which I am carrying or in a box to which I hold the key, it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it.

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[81] It is also noteworthy that the clothing and other personal items belonging to the accused found inside the bag (without meaning to degrade the accused) were not expensive for example like designer clothes etc that warranted two padlocks to lock the E bag from theft. Hence the inference for the court to draw is that the accused must have known of the nature of the valuable hidden drug inside the bag so as to use two padlocks.

Trafficking

F **[82]** By virtue of s. 2 of Act 234, "concealing" and "carrying" apply to the case of the accused in the light of the prosecution evidence. In *PP v. Abdul Rahim Kalandari Mustan* [2008] 5 CLJ 108, the Federal Court held that the definition of trafficking under s. 2 of the Act would be enough to constitute direct evidence for G trafficking without resorting to the presumption in s. 37(da) of Act 234.

Power of Disposal

H **[83]** The accused was alone with the drug and she held the keys to the padlock, her personal belongings were inside the bag. Therefore going by the definition on the power of disposal as seen in the Court of Appeal case in *PP v. Salleh Zakaria & Anor* [2010] 4 CLJ 671, the accused had such power. Per Suriyadi Halim Omar JCA:

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> Power of disposal in this context means he knew of their whereabouts (drugs) and could deal with them as if they were his own.

Credibility of Witnesses

[84] The court did not doubt the credibility of the prosecution witnesses especially when the accused and all of the witnesses do not know each other. The arrest of the accused was based on evidence and there was no entrapment as suggested by the defence.

Bag in Bangkok

[85] It is not in dispute that there is no testimony led by the witnesses for the prosecution to show how that black trolley bag (P9C) where the packet (P14B) of drug was hidden ended up at Suvarnabhumi International Airport (P24 - Electronic Itinerary) in Bangkok, Thailand. Nonetheless, the court discovers the probable answer from the documentary evidence as seen in exh. P24 on pp. 3 of 6 where the accused took the Ethiopian Air Lines flight on 6 September 2010 on Monday which took off from Contonou Airport *via* Lome Airport and from Lome Airport *via* Bole Airport in Addis Ababa and from Bole Airport *via* Suvarnabhumi Airport in Bangkok, Thailand. The Ethiopian Air Lines flight finally landed at Suvarnabhumi International Airport at 1.15pm on 7 September 2010, a Tuesday.

[86] The accused then boarded the Thai Airways International flight from Suvarnabhumi International Airport in Bangkok the same day which was 7 September 2010 which took off at 7.40pm to Penang International Bayan Lepas Airport. Therefore looking at the scenario, the court infers that the bag was unloaded from the Ethiopian Air Lines aircraft and taken to the Suvarnabhumi International Airport in order to enable it to be loaded onto a Thai Airways International aircraft in transit to Penang airport.

[87] However there was a hold-up in transporting the bag to Penang when somehow the airport authorities at the airport in Bangkok detected the presence of drug inside the bag and consequently it was detained by the Thai police for two days for reason better known to the Thai police themselves.

[88] The issue in connection with the bag being held up in Bangkok is whether during the period of two days there, could there be unknown person or persons who had put the drug inside the bag in such a manner?

[89] To do so would involve motive either to frame up the accused person or to exploit her without her knowledge that is after the bag had eventually safely reached Penang without being detected by the authorities, the person or persons responsible for it would approach the accused to retrieve the valuable drug.

[90] There was no evidence adduced by the defence that the accused had any enemy that would want to harm her. In any event, even if one with such motive were to plant the packet of drug into the bag of the accused, it would obviously be placed in a conspicuous position to enable the authorities to quickly notice it and would have not gone to such length as to modified the bag to hide the drug inside the specially modified compartment. To modify it would also be time consuming.

[91] As for the question of exploitation, there was no evidence of any tampering with the bag as seen in the evidence of the telefax as sent from the airport in Bangkok which was likely the place then where the opportunity arose in the absence of the owner of the bag to sneak the drug into the bag.

[92] Even PW7 had confirmed that there was no damage to the bag when it reached the airport in Penang and this fact was verified by the accused herself.

[93] What is of significance is to recall the testimony of Ooi Hai Soo (PW4) the Thai Airways Customer Service Manager who has worked at the Penang Bayan Lepas International Airport for 29 years out of the 39 years of his service with the Thai Airways. PW4 gave evidence that baggage in flight transit, are normally 'on the air side' meaning inside the air side which is designated as a security area. Normally no passengers or outsiders are allowed into this security area and baggage in transit will remain 'on the air side' meaning that no one can gain access to the baggage except the baggage handlers who handle the transferring of the baggage. The airport authorities do also have access to the baggage.

[94] Besides the bag was locked by two padlocks even if a master key could have opened them as pointed out by the defence, it does not carry much implication as there was a special modified compartment inside the bag. To hide the drug inside the bag needs more than just merely opening it.

[95] Therefore it is clear from the evidence given by PW4 that it is not easy to have approach to any of the luggage in transit in any international airport. In other words for the culprit to lay his hands on the bag of the accused at the airport in Bangkok for a sinister motive would have been difficult. The culprit might also run the risk of being caught by the airport authorities there.

[96] In addition to this issue, the court views that the slight increase which is negligible (31 kilograms compared with 31.5 kilograms) in weight of the bag does not necessarily mean that there was tampering with the bag in the light of the evidence given by PW4 that airport weighing scales always lose their accuracy and the scales need to be calibrated again every three or six months). This is understandable as hundreds of passengers used the weighing scales daily.

Finger print Dusting

[97] SP1 had testified that he had been instructed by PW12 to dust for finger prints on the packet (P14B) containing the drug but the result was fruitless. Hence it was pointless to send the packet to the chemist to look for fingerprints as argued by the defence.

[98] Moreover, assuming for a moment that the finger prints of the accused on the packet are discovered, at the highest it only shows that the accused had physical contact with P14B. Whether she had knowledge of the nature of its contents and whether she had possession of P14B together with the drug is another issue.

[99] In *Gunalan Ramachandran & Ors v. PP v.* [2004] 4 CLJ 551 (CA), the Court of Appeal viewed that where there is proof of possession, the absence of fingerprint impression does not affect the finding of possession.

***Prima Facie* Case**

[100] Thus after carrying out a maximum evaluation of the prosecution evidence and assessing the credibility of their witnesses and the probative value of the documentary evidence tendered and considering the submissions of both parties, the court finds that the prosecution had proved a *prima facie* case against the accused. The court then ordered the accused to enter her defence.

A **Three Alternatives**

[101] The three alternatives namely remaining silent, giving an unsworn dock statement or testifying from the witness box was explained together with their implications to the accused in the B English language in the presence of her defence counsel and her Uganda interpreter. The accused chose to give evidence from the witness stand in the Uganda language.

Defence

C **[102]** The accused gave evidence that prior to her arrest in connection with this case, she had come to Malaysia before to buy artificial pieces of jewellery like rings and necklaces especially for the women folks back home. She does this business.

D **[103]** The accused narrated that on 7 September 2010 when she arrived in Penang Bayan Lepas International Airport being her first visit to Penang, she lost her bag as she could not find it. She made a report on the missing bag and 'they' gave her a form to fill in stating that her bag was lost but there and then she did not E leave her telephone number. The next day the accused gave her telephone number to the Thai Airways office at the airport.

[104] In her evidence the accused related that before embarking on the trip to Malaysia, she sent her old bag for dry cleaning and when it was returned from the dry cleaner, the bag was still wet. F By then it was already time for her to take the flight and the accused requested to borrow another bag from her friend and neighbour a woman by the name of "Vicky" giving the reason that her bag was still wet after bringing it back from the dry cleaner.

G **[105]** The accused said that back in Uganda, Vicky and her Nigerian husband together with their family stayed on the upper floor while her unit is on the lower floor in the same condominium. The accused does not know the full name of Vicky but she heard people calling her "Vicky" and she has three H children called "John," "Peter," and "Grace." The accused also does not know the full name of Vicky's husband and she and others just called him "Father of John." The accused further said that Vicky's children used to play with her children and in Uganda neighbours are likened to relatives. She remarked that in Uganda, I "Borrowing a bag is not something great."

[106] When Vicky lent her the bag (exh. P9C) on 27 August 2010, she told the accused that actually it was her husband's bag. She added that "So when you are going, make sure that you do not delay so long." The accused answered "I would not take long I would travel fast and come back." Vicky went on to say "If you delay, anytime he will come back." At that time when Vicky lent her the bag, her husband was not around.

[107] After receiving the bag the accused said "Once I got hold of the bag, there was nothing to do except to put my clothing inside the bag and there were some padlocks which came together with the bag and I used them to lock the bag." The accused said that when she got the bag she did not suspect anything about it and did not know about the presence of the drug hidden inside the bag. If she had known of the presence of the drug, she would not have claimed the bag from the airport.

[108] The accused explained that when PW11 stopped her she became nervous as PW11 came with two other persons and they were not in uniform. The accused was then trying to find her way out and where to check out at the airport as it was her first time in Penang. At first she went up to the upper floor but was directed to go down to the ground floor to fill in a form in order to claim her bag.

[109] When the accused claimed her bag from the airport, she did not examine what was inside the bag as she did not suspect anything.

[110] The defence second witness Hajjah Noraihan bt Mohamed Adnan (DW1) a Consular in Uganda, gave evidence that ever since the accused had been arrested she had visited the accused in Penang Prison a few times in 2010 and in 2011. She had interviewed her and found out that she is a trader and she had borrowed the bag from her neighbour called Vicky in Uganda. Her son took the bag from Vicky.

[111] When DW1 was in Uganda she interviewed the son of the accused called Christopher and found out that Vicky and her Nigerian husband had left Uganda and even her shop was closed. DW1 even alerted the Uganda police, one Commander named Jevel Abdool, Head of the Rapid Response Unit about the accused case in Malaysia and how the accused came to borrow the bag which belonged to Vicky's husband.

Court: The learned deputy objected to the evidence as being hearsay.

Court: Objection. Reserved on a point of law.

After DW1 had finished testifying, the defence closed its case.

Closing Arguments

Defence

[112] The learned defence counsel argued that the prosecution had failed to prove its case beyond reasonable doubt against the accused.

Opening Speech

[113] Nothing was stated in the opening speech to show whether the prosecution would be depending on any presumption of finding of facts. The accused had suffered an injustice by such failure. *Wjchai Onprom v. PP* [2006] 3 CLJ 724 (CA) was referred to by the defence to also show that where the prosecution is relying on evidence of possession to prove actual trafficking by applying s. 2 of Act 234, such possession must be accompanied by some overt act on the part of the accused to be able to form trafficking.

Possession

[114] The learned counsel argued that the bag was not proven to be under the custody and control of the accused as the bag was either with the Airport Authorities in Bangkok or the Thai police during the two days it was there in Thailand. The prosecution also failed to prove knowledge. He cited *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 (SC) to support his contention that witnesses from the Thai police must be called to give evidence to begin the prosecution story on why the bag was found with them in Bangkok.

[115] There was the possibility that the bag was tampered there and the Thai police should have informed the Malaysian police about the incriminating bag. The prosecution did not ask the accused that she put the drug into the bag.

[116] The accused gave evidence that she had no knowledge of the drug concealed inside the bag. If she had the knowledge, she would not have gone to the airport to collect the bag. *Y Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605 (CA) was also cited to show whether the prosecution had proved possession.

PW11

[117] I/Balber Singh a/l Hadep Singh (PW11) the complainant of the case is not a reliable witness. There is a possibility of this witness giving false evidence. The only evidence shows the accused collected her bag from the airport and the bag was in good condition with no sign of tampering.

[118] The possibility that the bag could have been opened by another person or by the accused, whoever put the drug into the bag raises two inferences and the inference favourable to the accused must be drawn by the court. *Tai Chai Keh v. PP* [1948] 1 LNS 122 was cited to illustrate the principle.

Vicky

[119] The accused did not tell police about "Vicky" as she was not asked by them and the bag with the two padlocks was lent to her by Vicky. The person "Vicky" was not an afterthought and she is a real person.

[120] PW2 had gone to Uganda to look for Vicky but she had left Uganda and had even closed her shop there. The son of the accused had confirmed that he had taken the bag from Vicky. Her evidence is not hearsay.

[121] The accused did not know whether the Thai police or Vicky put the drug into her bag.

Jewellery

[122] The accused came to Penang to buy artificial jewellery to sell them back home and she was going to Queensbay Mall here to get them. She was told by a shop lot owner (name of shop lot "Eva") in Kuala Lumpur to come to Penang to shop for such artificial jewellery.

[123] Hence the accused had raised a reasonable doubt on the case for the prosecution and the accused should not be found guilty of the charge.

A **Prosecution**

Defence Called

[124] The learned deputy prosecutor argued that the court by calling for the defence of the accused, the court had been satisfied B that that all ingredients of the offence had been satisfied including the credibility of the witnesses for the prosecution. He cited *Junaidi Abdullah v. PP* [1993] 4 CLJ 201 (SC).

[125] At this stage, the duty of the court is to consider whether C the defence had cast a reasonable doubt on the prosecution case.

Bag

[126] Why must Vicky's husband be so foolish as to keep such amount of expensive drug inside the bag and kept it in the D condominium unit.

Artificial Jewellery

[127] It is not logical for the accused to fly all the way from E Uganda to buy artificial jewellery from Penang to sell them back home. Penang is not well known for such artificial jewellery. It is also not logical for the accused spend a lot of money for the flight just to buy such items.

F **Clothing**

[128] Personal belongings and clothing of the accused were found inside the bag to connect her with the possession of the drug.

Penang Bayan Lepas International Airport

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[129] The accused claimed that she was then not sure of her way at the airport and was looking for the exit when PW11 approached her. Evidence had been led that the accused was at the airport three times. On 7 September 2010 she had arrived there from Bangkok and the following day she went to see PW4 H about her missing bag at the Thai Airways office and on 9 September 2010 when she went to the airport to claim her bag which was sent by Thai Airways aircraft.

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[130] In reality the accused was not looking for the exit as her suspicious conduct shows that she was aware of the drug in her bag. Besides, the airport in Penang is not a big one where one can get lost easily.

PW2

[131] The evidence of PW2 does shed sufficient light on "Vicky." She was not present when the bag was not handed over to the accused. Her evidence is hearsay. The relationship between Vicky and the accused is good and no reason for the former to get the accused into serious trouble.

Thai Police

[132] The police in Bangkok had no reason to put the drug into the bag of the accused.

[133] Thus the prosecution had proved its case beyond reasonable doubt against the accused and he should be convicted on the offence.

Court – Analysis of Defence Story

Issues

(1) Is "Vicky" a real person or a fictitious character?

(2) Whether the trip of the accused to Penang, Malaysia, was actually to buy artificial jewellery to trade them back home in Uganda?

[134] After evaluating the total evidence adduced by the accused in the light of the prosecution case, the court finds that "Vicky" as claimed by the accused to have lent her the bag (P9C) containing the drug does not exist for the following reasons:

(1) "Vicky" her condominium neighbour back in Uganda who purportedly lent her husband's bag containing the valuable drug hidden inside the bag without his permission to the accused told her that "So when you are going, make sure that you do not delay so long. If you delay any time, he will come back."

A It goes against common sense that the accused who embarked on a flight to a far away destination like Malaysia would be willing to take the bag. This is because if assuming "Vicky" were a real person, there was no evidence that she knew when her husband would be returning home as he could even
B come home the very day that the accused had taken the bag. By such time the accused probably would be on the aircraft flying to her destination. If the accused had only wanted to borrow the bag for an hour or so for use within the vicinity of the condominium she was staying in Uganda then it would
C be more reasonable.

(2) The explanation or story of the accused also does not sound perfectly plausible. She gave evidence in her examination-in-chief "When I was going to travel, my old bag, and I took it
D to dry clean. When they brought it back from the dry cleaner, it was still wet, and it was already time for me to travel. So I asked Vicky for another bag as my bag was wet and Vicky gave me this bag for travelling."

E When the accused could spend so much money on her trip to Malaysia purportedly to buy artificial jewellery, so why she could not just apportion a sum of her budget to buy another bag for her travel which would not cost her a lot of money. For travelling to a far away country, any reasonable traveller would have known the basics like first having a luggage in
F reasonably good condition to keep the personal belongings, suitable clothing to wear for the country one is heading and the like.

(3) Moreover if Vicky really exists, surely as pointed out by the
G learned deputy public prosecutor, her husband would not leave such a bag containing drug which fetches a high street value unattended in his residence or at the least he would have told his wife not to use it.

H (4) PW2, who had supposedly gone over to Uganda to look for Vicky did not produce any proof like documentary evidence for example like tenancy agreement in relation to her stay in the condominium unit, photographs of Vicky, her immigration records and so forth to show that Vicky really is a real person
I and not a fictitious character. In addition to her claim, PW2

did not tender any documentary evidence like her flight ticket to Uganda, documentary record of her meeting with the Ugandan Police Commander and so forth to show that she had been there to gather favourable evidence in support of the case for the accused. Her evidence in essence is hearsay.

(5) If "Vicky" were a real person, surely at the earliest opportune moment her name and her role in the case involving the accused, would have been put to the prosecution witness, especially the investigating officer PW12 but this was not done by the defence. Apart from such failure, the accused tried to explain that she was not asked about such matter by the police when she was subsequently being arrested by them. A truly innocent person in such a situation as faced by the accused would have blurted out the name of the person the very moment when the drug was being discovered in the bag at the airport.

[135] It is settled law that generally if the accused passed up the opportunity to lay the foundation of his core defence during cross examination of the prosecution witnesses he will bear the risk of the trial court later making an inference that the thrust of his defence is a concoction.

[136] In *PP v. Dato Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215, the High Court held that this legal step is not merely a technical rule of evidence but a rule of essential justice. It aims to avoid surprise at the trial and to prevent a miscarriage of justice. It gives notice to the opponent what is the actual case that will be thrashed out.

[137] In *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154 (CA) the Court of Appeal held that in Malaysian criminal law, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt. It is trite law that the defence should put his case to the prosecution at an early stage during the stage of the case for the prosecution and the failure to do so may move the trial judge to find that a particular aspect of the defence case as an afterthought.

[138] See *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ (FC) 256.

[139] Thus, all in all, the court finds that the person "Vicky" as claimed by the accused to have lent her the incriminating bag does not exist. It was a crafted defence to throw the blame onto the fictitious character "Vicky" because the accused was caught red-handed with the drug.

[140] The accused had custody or control of the bag and had knowledge of the nature of the hidden content inside the bag. Her conduct at the airport gave away the true purpose of her trip to Penang.

[141] As admitted by the accused herself "Once I got hold of the bag, there was nothing to do except to put my clothing inside the bag ..."

[142] PW11 had said in his testimony that he found a hard layer at the bottom of the bag. Thus in all probability when the accused was packing her clothes, she ought to have felt the hard layer at the bottom of the bag.

[143] Section 8(2) of the Evidence Act 1952 applies as the accused was seen by PW11 to have acted furtively and keeping a look-out as she was pulling the trolley bag which held the drug. Although PW11 had already identified himself as a police officer to her, nevertheless the accused still remained confrontational by retorting "Why you checked on me?" As pointed out by the prosecution the accused should be familiar with the airport building.

Buying Artificial Jewellery

[144] It is hard to believe that the accused came all the way from Uganda to Penang just to buy artificial jewellery to sell back home as Penang is not the hub in South East Asia or Asia as a whole for such ornaments like artificial rings, necklaces or bracelets. If her trip was to buy nutmegs then there might be a basis.

[145] The accused claimed to be a trader doing such business yet without any intention to degrade the accused, when she was caught, not much money was found on her person, only RM226 was recovered. Surely, a business woman, putting aside a big timer, would have brought along with her at least a reasonable amount of capital to buy the items. Therefore her evidence that she came over to Penang for such a purpose is not true.

[146] After having reminded itself of the legal burden to be borne by the prosecution throughout the whole trial as illustrated in the cited case *Mat v. PP*, the court finds that the accused failed to raise a reasonable doubt (See the cited case in *Mohd Radhi Yaakob v. PP*) on the prosecution case and the prosecution had proved its case beyond reasonable doubt against the accused.

[147] For the reasons aforesaid, the court finds the accused guilty of the charge and convicted her of the offence. The accused was sentenced to death.